



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**E&L CASE NO. 56 OF 2020**

**GEOFREY KIPTARBEI RONO.....PLAINTIFF**

**VERSUS**

**JOHANA KOMEN ROTICH.....1<sup>ST</sup> DEFENDANT**

**MILKA JEPKIRWA KORIR.....2<sup>ND</sup> DEFENDANT**

**KENYA COMMERCIAL BANK.....INTERESTED PARTY**

**RULING**

This ruling is in respect of a Notice of Preliminary objection dated 5<sup>th</sup> October, 2020 by the 1<sup>st</sup> and 2<sup>nd</sup> defendants seeking for the following orders:

- a) The Application as well as the entire suit is incompetent, bad in law, vexatious, and an abuse of court process.
- b) The entire suit discloses no reasonable cause of action against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
- c) The entire suit violates the provisions of the Limitation of Actions Act Cap 22 of the Laws of Kenya.

Counsel agreed to canvas the preliminary objection vide written submissions which were duly filed.

**APPLICANT'S SUBMISSIONS**

Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants submitted that there was no contractual relationship between the Plaintiff and the Defendant, and that there is no reasonable cause of action against the Defendants.

Counsel relied on the case of **Charles Njihia Ndung'u –vs- Mercy Wamaitha Kaburi [2018] eKLR** where the Court considered the doctrine of privity of contract. That the Plaintiff's complaint is premised on an agreement that is itself premised on another agreement which is not produced in evidence.

Counsel referred the court to paragraphs 5 and 6 of the Plaintiff wherein the plaintiff averred on how the suit property was acquired and submitted that the evidence in form of the initial sale agreement was not submitted before the Court and the Law of Contract Act vide Section (3) requires that all agreements on disposition of land must be made in writing. Further that since there is no agreement presented then the sale agreement being relied upon by the plaintiff is void and cannot be relied upon by the plaintiff in the suit herein.

Counsel further cited the case of **Leo Investment Ltd v Estuarine Estate Ltd [2017] eKLR**, where the Court emphasized the importance of compliance with the provisions of Section 3 (3) of the Law of Contract Act and held that “a contract which does not meet the formal requirements set out in Section 3(3) of the Law of Contract Act is a nullity ab initio.”

It was defendant's counsel's submission that the names of the alleged original sellers of the property, Benjamin Kuto and David Kiptanui Kamarei are not on the green card and did not have a proprietary interest to sell and that the Plaintiff's claims are misconceived.

Counsel also submitted that the plaintiff ought to have included the said Benjamin Kuto and David Kiptanui Kamarei in the suit so that they can shed light on the circumstances relating to the sale of the property.

Mr Oduor relied on the principle of *nemo dat quod non habet* as addressed by the Court in the case of **Daniel Kiprugut Maiywa v Rebecca**

**Chepkurgat Maim [2019] eKLR**, where the Court held as follows;

*“The nemo dat principle means one cannot give what he does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else. Accordingly, an unauthorized transfer of the title by any person other than the owner generally has no legal effect, which means the owner continues to hold the title to the property while the person who received the invalid title owns nothing.”*

Mr. Oduor counsel for the defendants submitted that the Plaintiff is bound by his pleadings where his claim is to the effect that he entered into a transaction to buy land vide an agreement dated 11<sup>th</sup> July, 1994 and 26 years later the Plaintiff is seeking to enforce rights that he sought to acquire under that agreement. That the plaintiff ‘s suit is time barred by dint of section 7 of the Limitation of Actions Act and urged the court to uphold the preliminary objection with costs to the defendants.

### **RESPONDENT’S SUBMISSIONS**

Counsel for the plaintiff opposed the preliminary objection and relied on the case of Mukisa **Biscuit Manufacturing Co. Ltd —Vs- West End Distributors Ltd (1969) EA 696**, which laid down the threshold to be met in preliminary objections. Counsel submitted that the current preliminary objection by the applicant does not meet the threshold as it is not based on pure points of law but facts which must be proved.

Counsel relied on the case of **Francis Kiptanui Makiche v Susan Kiplagat [2017] eKLR** where Justice Ombwayo stated;

*“I have considered the submissions of Mr. Miyiinda and do agree that the defendant has not established that the suit is frivolous or defective. A suit can only be declared frivolous or defective if a defendant establishes so by way of an application to strike out but not through a preliminary objection. Moreover, there is an issue of possession raised by the plaintiff which cannot be addressed through a preliminary objection.”*

Mr Mathai also cited the case of Janet **Syokau Kaswii v Kathonzwi Financial Service Association [2014] eKLR**, where the court held that:

*‘the court emphasized the point that a proper preliminary objection raises a pure point of law which if argued on the assumption that d/ the facts pleaded by the other side are correct and what a preliminary objection cannot be raised if any fact had to be ascertained off what is sought is the exercise of judicial discretion on the part of the court’.*

Counsel therefore submitted that the suit is founded on fraud as particularized in paragraph 22 and 23 of the Plaintiff’s pleadings which are serious allegations whereby Limitation of Actions only run from the time the fraud was detected by the plaintiff.

Counsel therefore urged the court to dismiss the preliminary objection with costs to the plaintiff.

### **ANALYSIS AND DETERMINATION**

The issue for determination is whether the notice of preliminary objection meets the threshold of a preliminary objection as set out in the *Mukisa Biscuit case*(*supra*) which stated as follows:

*“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea to the jurisdiction of the court or a plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration, a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which if argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”*

*Further in the Court of Appeal case of **Nitin Properties Ltd v Singh Kalsi & another [1995] eKLR** the principle was expounded as follows:*

*“...A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”*

The applicant raises the issue that the entire suit is incompetent and goes further to rely on elaborate facts on the background of the case and the agreements that the plaintiff and the defendants entered into with parties that are not before the court.

All what the applicant has presented is what the court will hear during the presentation of the case. The court cannot terminate a case at a preliminary stage where the applicant is relying on facts and not pure points of law.

On the issue of Limitation of Actions Section 26 provides as follows: -

Provided that this section

i) In the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

ii) In the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made

The plaintiff has pleaded fraud under paragraph 23 of the plaint where he has particularized the fraud. In the case of **Justus Tureti Obara vs Peter Koipeitai [2014] eKLR** wherein J. Okong'o held that;

*“I am in agreement with the Plaintiff’s submission that the Plaintiff’s claim is for the recovery of the suit property from the Defendant and as such the limitation period for such a claim is 12 years as provided for in section 7 of the Limitation of Actions Act, Cap. 22, Laws of Kenya. I would wish to point out further that the Plaintiff’s case although for recovery of land is based on fraud. The proviso to section 26 (a) of the Limitation of Actions Act, Cap. 22, Laws of Kenya provides that where an action is based on the fraud of the Defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the Plaintiff herein discovered the fraud alleged against the Defendant is a matter to be ascertained at the trial”.*

Where a claim is anchored on fraud the limitation period does not begin to run until the plaintiff has discovered the fraud.

Having considered the pleadings, the submissions by counsel and the relevant authorities, I find that the preliminary objection lacks merit and is therefore dismissed with costs to the plaintiff.

**DATED AND DELIVERED AT ELDORET THIS 22<sup>ND</sup> DAY OF JUNE, 2021**

**M. A. ODENY**

**JUDGE**